

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE**

STATE OF MAINE, *et al.*,

Plaintiffs,

v.

ANDREW WHEELER,
Acting Administrator, U.S. Environmental
Protection Agency, *et al.*,

Defendants.

Civil Action No. 1:14-cv-264-JDL

**EPA’S MOTION FOR A VOLUNTARY REMAND, MOTION FOR STAY OF THE
PROCEEDINGS PENDING THE COURT’S DECISION ON EPA’S MOTION FOR
VOLUNTARY REMAND, AND INCORPORATED MEMORANDUM OF LAW**

Defendants Andrew Wheeler, in his official capacity as Acting Administrator of the United States Environmental Protection Agency, and Alexandra Dapolito Dunn, in her official capacity as Regional Administrator of Region I of the United States Environmental Protection Agency (collectively “EPA”),¹ respectfully move for a voluntary remand of EPA’s February 2015 decisions that are challenged in this case. As specifically set forth in Paragraph 3 of this motion, EPA intends to revise the February 2015 decisions and it therefore seeks a voluntary remand in order to do so. Because EPA’s merits brief is currently due to be filed on July 30, 2018, and because EPA intends to revise the February 2015 decisions instead of defending them in this case, EPA also moves to stay the proceedings on the merits until the Court decides EPA’s motion for voluntary remand. The reasons for this motion are as follows:

¹ Pursuant to Fed. R. Civ. P. 25(d), Andrew Wheeler, Acting Administrator, and Alexandra Dapolito Dunn, Regional Administrator, are substituted for their predecessors in office.

1. Plaintiffs the State of Maine, and Paul Mercer, in his capacity as Commissioner of the Maine Department of Environmental Protection (collectively “Maine”) here seek judicial review of EPA’s decision in February 2015 to disapprove some of Maine’s Water Quality Standards (“WQS”) under the Clean Water Act (“CWA”), and EPA’s related interpretation and approvals of Maine’s WQS as including a designated use of sustenance fishing in Indian waters in Maine.
2. EPA and Maine have recently been involved in settlement discussions that would have obviated the need to litigate the merits if they had been successful. Those settlement discussions have now concluded without a negotiated resolution of this case.
3. EPA has decided to change, and not to defend, its decisions to: (1) interpret and approve Maine’s fishing designated use in its WQS to mean sustenance fishing in the waters in the Maine Tribes’ Reservations and trust lands; (2) approve provisions in the Maine Implementing Act as a sustenance fishing designated use under the CWA in the inland waters of the Penobscot Indian Nation’s and Passamaquoddy Tribe’s Reservations; and (3) disapprove Maine’s human health criteria in its WQS as not sufficiently protective of the sustenance fishing designated uses in Indian waters. Because EPA has decided that it will revise the February 2015 decisions, it here seeks a voluntary remand of the February 2015 decisions in order to do so.
4. EPA is mindful that in 2017, it sought a stay in order to reconsider the February 2015 decisions and determined that it would not change the decisions at that time. Subsequent to its determination not to change its February 2015 decisions upon reconsideration in 2017, EPA has a new Acting Administrator, a new Assistant

Administrator for Water, and a new Regional Administrator for EPA Region I (New England), and EPA has now decided that it will revise the February 2015 decisions as set forth in Paragraph 3 of this motion. In addition, as the Agency previously informed the Court, in its February 2015 decisions, EPA referenced a January 30, 2015 letter from the Department of the Interior (“DOI”), addressing Maine’s WQS and tribal fishing rights of the Maine tribes. Subsequent to the 2017 reconsideration process, on April 27, 2018, DOI sent a letter to EPA indicating that it had revisited and clarified its position with respect to conclusions that it had reached in January 2015. EPA intends to consider DOI’s 2018 letter in revising its February 2015 decisions.

5. Federal agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). EPA’s interpretations of statutes it administers are not “carved in stone” but must be evaluated “on a continuing basis,” for example, “in response to . . . a change in administrations.” *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks and citations omitted). *See also Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (a revised rulemaking based “on a reevaluation of which policy would be better in light of the facts” is “well within an agency’s discretion). Indeed, the Supreme Court has explicitly recognized that an agency must be allowed to assess “the wisdom of its policy on a continuing basis.” *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837,

864 (1984). As discussed above, EPA has new officials in place, it has reassessed the wisdom of the policies reflected in its February 2015 decisions, and it has determined to materially revise the February 2015 decisions set forth in Paragraph 3 above.

6. The Court should grant EPA's motion for voluntary remand under these circumstances. *See Anchor Line Ltd. v. Fed. Maritime Comm'n*, 299 F.2d 124, 125 (D.C. Cir. 1962) (“[W]hen an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency”); *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (“Administrative reconsideration is a more expeditious and efficient means of achieving adjustment of agency policy than is resort to the federal courts.”) (*quoting Commonwealth of Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978)).
7. EPA requests remand without vacatur of its February 2015 decisions. A reviewing court is not required to vacate an agency decision on remand, and EPA request that the Court remand without vacatur here. *See Central Maine Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001)(addressing vacatur in the context of an involuntary remand). EPA does not here concede legal error with respect to its February 2015 decisions, nor is it required to do so in order to secure a voluntary remand. *See Ohio Valley Envtl. Coal. v. Arocoma Coal Co.*, 556 F.3d 177, 215 (4th Cir. 2009). But EPA has determined to change the February 2015 decisions and EPA will provide its full rationale when it changes the February 2015 decisions on remand.
8. Because EPA has determined to revise the February 2015 decisions set forth in Paragraph 3 to this motion, it does not intend to defend the February 2015 decisions on the merits in this case. EPA's merits brief is currently due to be filed on July 30,

2018. If the Court grants this motion for voluntary remand, it will obviate the need for EPA to file its merits brief. EPA therefore requests that the Court stay the proceedings on the merits until after the Court rules on EPA's motion for voluntary remand.

9. Counsel for EPA has informed counsel for all parties of EPA's intention to seek the relief stated in this motion. Maine intends to review the motion after it is filed before deciding what position to take with respect to the motion. Intervenor-Defendants Penobscot Nation and the Houlton Band of Maliseet Indians have each indicated that they intend to oppose the relief requested in this motion.

For all these reasons, the Court should grant this motion and remand EPA's February 2015 decisions to EPA. In the interim, the Court should hold the proceedings on the merits in abeyance until after the Court rules on EPA's motion for voluntary remand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that all counsel of record who have consented to electronic service are being served with a copy of the foregoing EPA's Motion for a Voluntary Remand, Motion for a Stay Pending of the Proceedings Pending the Court's Decisions on EPA's Motion for Voluntary Remand, and Incorporated Memorandum of Law on this 27th day of July 2018. Any other counsel of record will be served by first class U.S. mail.

s/David A. Carson